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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

**DISCUSSION OF RELEASE OF STAFF PAPERS
DISCUSSED AT PUBLIC MEETINGS**

Place - Washington, D. C.

Date - Tuesday, February 21, 1978

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

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5 DISCUSSION OF RELEASE OF STAFF PAPERS
6 DISCUSSED AT PUBLIC MEETINGS

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9 Room 1130
10 1717 H Street, N.W.
11 Washington, D.C.

12 Tuesday, February 21, 1978

13 The Commission met, pursuant to notice, at 1:55 p.m.

14 BEFORE:

15 DR. JOSEPH M. HENDRIE, Chairman

16 PETER A. BRADFORD, Commissioner

17 VICTOR GILINSKY, Commissioner

18 RICHARD T. KENNEDY, Commissioner

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P R O C E E D I N G S

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CHAIRMAN HENDRIE: Okay. Could we come to order?

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The subject before the Commission is discussion of a paper from the Office of Policy Evaluation and the General Counsel on the release of documents that are discussed at open meetings of the Commission.

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We had earlier dealt with a number of related aspects, transcripts of Commission meetings, tape recording of Commission meetings by people in the audience, television coverage of hearing boards and so on. This is another item in that sequence of communication matters.

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I notice there are a number of options. I picked my way through this paper with more than the usual difficulties. I hope that Steve, you and Ken, will be able to lay it out for us in clear terms.

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Would you like to start?

MR. PEDERSEN: Why not?

I think your difficulty, Mr. Chairman, in picking your way through it was no less than our difficulty in trying to accommodate everyone's view.

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CHAIRMAN HENDRIE: If you get beyond the place where there's the obvious and stupid option on this side and the obviously stupid on this one so that I'm left with the one in the middle, once you go past that --

25

MR. PEDERSEN: It started that way, Mr. Chairman,

gsh 1 but it blossomed, as various offices had to look at it.

2 So I sympathize with your difficulty. As you
3 said, this came out of the general set of issues regarding
4 a series of questions dealing with public meetings.

5 I believe it was initially raised in an OGC
6 memo, or whatever, a list of things that the Commission
7 might want to consider, one of which is releasing papers
8 that were discussed or were the subject of these open
9 meetings. And this paper attempts to provide you with a
10 set of options as to whether you want to do it. If so,
11 which documents? And when? And under what conditions?

12 I think the general concern here is the idea that
13 release of these papers, in one way or another, would assist
14 the public in following these public meetings and
15 understanding what was being discussed, and perhaps make sense
16 of the transcripts, more sense of the transcripts if they
17 choose to study them in the PDR, or whatever.

18 As an opening, I would say that whatever the
19 Commission decides, short of the status quo, particularly if
20 you go with options 3, 4, or 5, one of those, that you will
21 be going significantly beyond what's required of you in any
22 legal sense, and fairly significantly beyond what any other
23 agency in town that we were able to find is currently doing.

24 So if you go with option 3, 4 or 5, you would be
25 moving out pretty much into the vanguard of agencies in this

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1 regard.

2 I'll try to summarize some of the considerations
3 in the paper very briefly. Then if you have particular
4 areas you're interested in, we can go back over them in
5 more detail.

6 However, I won't try to speak for every office
7 that's represented here. I'm sure they can speak well for
8 themselves.

9 In terms of the details of their recommendations, I
10 think the policy option, the major policy considerations are
11 pretty easily understood here. They're essentially balancing
12 here a consideration of openness and being more forthcoming
13 with the public with regard to letting them see the
14 documents that you're looking at in the deliberations and the
15 open meetings, balancing this off against the protection of
16 your ability to give candid observations, candid advice, and
17 so on.

18 This is a classic argument or debate. We've had
19 it here in various contexts, and I think you understand the
20 issues, certainly, as well as I and the staff do.

21 Let's turn then to the options that we presented
22 and I'll try to summarize them briefly, indicate where the
23 various offices come out, and then let them speak more
24 for themselves and respond to your questions, if you have
25 them.

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1 Option 1 is essentially the status quo option,
2 which would be to continue present practice. We do from
3 time to time make papers available and put them in the PDR.
4 We did that with the GESMO paper at one point just prior to
5 a meeting.

6 So present practice entails something on an ad
7 hoc case-by-case approach. But by and large, we have left
8 these papers to be gotten through the FOIA procedures with
9 the opportunity from time to time of putting them in the
10 public document room, but on the base of a discretionary
11 ad hoc action by the Commission.

12 The second option goes a slight step beyond that,
13 and that would be to have the staff prepare a summary of the
14 paper, a short summary, which would be put in the public
15 document room in advance of the meeting.

16 Now there's some precedent for this. From time
17 to time now the staff prepares vugraphs and so on, and they're
18 available when people come through the door. And they are
19 used by people who come and attend the meetings.

20 This would simply extend it to mean that there would
21 be a summary-type of statement connected with every SECY paper
22 that you discussed in an open meeting.

23 COMMISSIONER GILINSKY: Release the summary or prepare
24 a summary especially for release?

25 MR. PEDERSEN: The summary would probably be

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gsh 1 prepared especially for release or with an eye toward
2 release.

3 Not every paper you get now has an executive
4 summary associated with it.

5 I would think in most cases, Commissioner, the
6 summary you would release is essentially the summary that
7 is already available in some of these papers.

8 COMMISSIONER KENNEDY: Can the staff estimate the
9 cost in effort and time?

10 MR. PEDERSEN: They did not estimate in terms of
11 man-hours. However, I was about to say that with respect
12 to this particular option, the staff virtually unanimously
13 viewed that the summary, the preparation of such a summary
14 for each paper would be a rather time-consuming burden
15 on them.

16 COMMISSIONER GILINSKY: What's the point of
17 releasing summaries and not releasing papers?

18 MR. PEDERSEN: This is merely an option. The
19 idea would be, I suspect --

20 COMMISSIONER GILINSKY: No, what's the point of
21 it?

22 MR. PEDERSEN: The idea would be that the summary
23 would detail sort of the general points of the briefing. But
24 if the paper contained, let's say, some sensitive analysis
25 in it, or some kind of indication of, I don't know,

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gsh 1 disagreements between the staff and whatever that you
2 felt might not be in the public interest to reveal, the
3 summary could give the broad highlights.

4 COMMISSIONER GILINSKY: Which means that some
5 releases would be pretty bland.

6 MR. PEDERSEN: I think how bland or how detailed
7 they would be would be a matter either up to the staff or
8 would be a question of Commission guidance.

9 I think the Commission would have to perhaps give
10 the staff greater guidance if they felt they were too
11 bland.

12 My guess is, if you ask me personally, yes, the
13 summaries would probably be rather bland documents, probably
14 quite general in tone.

15 COMMISSIONER GILINSKY: What fraction of the
16 documents now have summaries?

17 MR. PEDERSEN: To be honestly truthful, I have not
18 done an analysis.

19 Lee, do you have any sense --

20 MR. GOSSICK: A special summary?

21 MR. PEDERSEN: No, not a special summary. But many
22 of them have now in the first three or four paragraphs of
23 the paper, you'll frequently find what would amount to an
24 overview of the paper, and I would imagine that would
25 become the summary.

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1 MR. GOSSICK: Sometimes the paper is sort of
2 briefed down to its essentials with the staff paper with
3 the great depth is attached.

4 MR. PEDERSEN: No special summaries are being
5 prepared now at all, no.

6 But I think if you read the papers, in many cases
7 you get a cover memo that amounts to a summary and I would
8 think the summary would essentially be that in many cases.
9 There are no special summaries being prepared now.

10 Another thing would be that I guess there would
11 be a cost factor. If your decision was for these papers,
12 if you wanted to make them available just beyond the PDR
13 available, let's say, to an audience that came in, many of
14 these papers get quite lengthy. And a summary would allow
15 you to keep this within bounds in terms of work effort,
16 cost, to SECY, per SECY, and other parts of the staff.

17 COMMISSIONER GILINSKY: Are you really talking about
18 printing a new class of documents that don't exist now?

19 MR. PEDERSEN: In terms of option 2, that's
20 absolutely correct. I don't know what it would be in terms
21 of documents, but it would be a new piece of the SECY paper.

22 Yes, that is not the option, by the way,
23 Commissioner, that any member of the staff recommends. I'm
24 just taking you through the various options.

25 I was hoping to summarize the paper. Okay?

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1 COMMISSIONER BRADFORD: We've been known to do
2 things sometimes in that framework.

3 MR. PEDERSEN: That's another point, too. You
4 might see wisdom in it where we could not.

5 No member of the staff recommended that option.
6 Okay?

7 The third alternative is a discretionary release
8 of all staff papers submitted to the Commission that would
9 be discussed or that are subjects of open meetings. And
10 this begins to get a little complex.

11 So here's where I'll try to simplify, if I could.

12 What this option foresees is that staff papers that
13 are the subject of open meetings would be released in
14 advance. No later than one day in advance, I believe is the
15 term used in the paper, at the discretion -- or put it
16 another way -- unless the director of the originating office
17 or if the Commission chooses at the discretion of the
18 Commission -- this is an option you might want to avail
19 yourself of -- chooses not to make it so available. And
20 in making such a decision, the director of the originating
21 office would have to specify a certain reason why he is
22 not making it available to the PDR.

23 And we suggest, or the paper suggests, I should
24 say, that those guidelines would encompass a number of the
25 FOIA exemptions, namely, 1, 3, 4, 7. This deals with

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gsh 1 classified information, proprietary information, unwarranted
2 invasion of privacy, and so forth, or where there would be
3 "a sufficient prospect of actual harm to legitimate public
4 or private interest. Access to the requested record to
5 be granted."

6 And this is essentially the Department of Justice
7 standard.

8 COMMISSIONER BRADFORD: Is that last phrase the
9 difference between option 3 and option 5?

10 MR. PEDERSEN: Well, no. The main difference
11 between option 3 and option 5, Commissioner, is not that
12 phrase. It's the ability to withhold.

13 Option 5 foresees that all documents would
14 automatically go to the PDR, that an office director could
15 not say, although I think you would have to, as it points
16 out here, clearly in a case of classified information,
17 there would be certain instances that you simply couldn't
18 hurdle. But option 5 would say papers would automatically
19 go in the PDR.

20 COMMISSIONER BRADFORD: Whether they're discussed
21 or not?

22 MR. PEDERSEN: Whether they're discussed or not.
23 We haven't gotten to that little twist yet in option 3.

24 MR. OSTRACH: Commissioner, as a practical matter,
25 yes, sir. Largely, documents that could be withheld on

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1 the basis of exemptions 1 and 3, 4 or 7, would not be
2 discussed at open meetings anyway. So there would be
3 very few cases where those exemptions would justify staff
4 withholding a paper that we're discussing in this
5 situation here.

6 That's only the second part of the Justice
7 Department standard. The first part is that it be pre-
8 decision or with material under exemption 5.

9 Up to the time of the meeting, though, all of
10 these papers would be such.

11 MR. PEDERSEN: The main difference between 3 and 5
12 purely then is whether the office director would have the
13 discretion to say, "I don't think that they should be made
14 available," or would not have the discretion.

15 Now that discretion could either reside with the
16 office director, or it could be a recommendation on his part
17 in which the Commission could then make the final decision.

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18 I think the staff is unanimous in recommendation
19 that the Commission not involve itself in that decision,
20 for reasons that I think would just get extremely complex
21 and would usually bring up tight against the deadline anyway
22 in these cases. And you would probably never get it in the
23 PDR 24 hours in advance if you left it to the Commission
24 to make these decisions.

25

jwb 1 Or, that particular decision. Let me turn to
2 Option 4, and then I'll come back -- because Option 3 and
3 4 are the two options that the various staff components
4 recommend -- and then I'll indicate some of the differences
5 between them.

6 Option 4 provides for an automatic release of
7 SECY papers that are the topics of the open meetings. In
8 other words, it would be limited to just the SECY paper
9 that is the topic of the meeting that is usually identified
10 on the agenda, and it would be automatic.

11 There would be no discretion. If the schedule
12 says "Discussion of SECY such-and-such such-and-such,"
13 that would automatically be released -- unless, of course,
14 it had classified portions, or something. And in those
15 cases, you probably would not be dealing with it in an
16 open meeting, in any case.

17 Now, where -- do the various offices -- I won't
18 go into 5, unless you want to, because no one has come out
19 in favor of 5. Where do the various offices come out --

20 COMMISSIONER GILINSKY: Just a minute. What is
21 5?

22 MR. PEDERSEN: 5, Commissioner, is: that all
23 documents discussed at open meetings, or the topic of
24 discussion at open meetings, would be released.

25 COMMISSIONER GILINSKY: That means any document

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1 that would be mentioned would be released?

2 MR. PEDERSEN: Yes. And if you wanted to
3 release in advance, Commissioner, you'd have to say "any
4 document that you anticipated might be mentioned."

5 One of the reasons this paper is so complex
6 is that there are issues weaving within issues. What do
7 you want to release? When do you want to release it?
8 Under what conditions can you not release it?

9 Under Option 5, if you wanted to release in
10 advance, you would have to not only release all documents
11 that you anticipate --

12 COMMISSIONER GILINSKY: Forget about "in
13 advance." Suppose you released the SECY paper in advance,
14 and you have a discussion, and various other documents are
15 mentioned. Suppose a document is mentioned which is on
16 its way up to the Commission.

17 MR. PEDERSEN: You mean: has not come to the
18 Commission, yet? Is in preparation?

19 COMMISSIONER GILINSKY: Does 5 contemplate
20 releasing that?

21 MR. PEDERSEN: All that we were thinking of was
22 about documents that were completed. I can see -- that's an
23 interesting point you raise, which, quite frankly, I hadn't
24 thought of -- where you could have a reference made to a
25 document under development, then would you be committing

jwb 1 yourself, in advance, to release that? We did not
2 anticipate that would be the case.

3 COMMISSIONER GILINSKY: You're just talking
4 about documents in final form?

5 MR. PEDERSEN: We're talking about documents
6 discussed -- that the Commission has in hand.

7 COMMISSIONER GILINSKY: Now "documents in final
8 form," insofar as they're the subject of Commission
9 discussions, would get released in due course, anyway,
10 right, under, say, Option 4?

11 MR. PEDERSEN: If they were discussed, and if
12 the office director of the originating office agreed to
13 release them.

14 COMMISSIONER GILINSKY: If they were the subject
15 of the meeting.

16 MR. PEDERSEN: If they were the subject of the
17 meeting, or if they were discussed at the meeting. That's
18 what Option 3 foresees.

19 In a minute, I'm going to explain that this is
20 where OGC and OPE sort of part company. And maybe it'll
21 become clear to you, as I go into that. Okay?

22 All right. There essentially are three options
23 that the staff -- the various staff components -- have
24 congealed around. I think I can state them fairly simply:

25 OGC and EDO, and I believe SD, believe that all

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1 papers that are --

2 COMMISSIONER KENNEDY: Who is "EDO"?

3 MR. PEDERSEN: It was signed by Mr. Gossick.

4 The packages, Commissioner, are all the comments that we
5 have here.

6 COMMISSIONER KENNEDY: Oh.

7 MR. GOSSICK: It includes INE and ELD, also.

8 MR. PEDERSEN: But INE and ELD sent their own
9 separate papers, so I assumed that where there was a
10 statement in here that was stated in a general term, that
11 that was the EDO together with INE and SD, as amended.

12 COMMISSIONER KENNEDY: I was just asking, because
13 I noted the comment about EDO, and I saw the EDO memo. But
14 then I saw, also, a number of others -- I couldn't figure it
15 out.

16 MR. GOSSICK: There are some "yes, but"s attached
17 to my memo, to reflect the views of the various offices.

18 MR. PEDERSEN: It's "EDO," except where noted
19 otherwise, I guess would be the best way to state it.

20 COMMISSIONER BRADFORD: Is there any distinction
21 drawn anywhere, in any of these, between documents coming
22 from outside the Commission's offices, and those that our
23 own staff would generate?

24 MR. PEDERSEN: I think, if you mean your own
25 assistants within your offices, I think that none of us

jwb 1 contemplated, nor does this paper contemplate, that those
2 would be made public and put in the PDR.

3 I feel the staff didn't feel that was their
4 prerogative. That would be a decision, it would seem to
5 me, the Commissioners would have to make. And it would be
6 a little presumptuous of us to recommend that you do that.

7 So, we did not contemplate addressing --

8 COMMISSIONER BRADFORD: All that hand-written
9 marginalia.

10 MR. PEDERSEN: Yes. We did not contemplate
11 that. We reserved our attention to our own papers. So,
12 OGC and EDO, and I believe ELD and SD, believe that all
13 papers that are the topic of discussion, and that address
14 that topic which will be discussed, should be put into the
15 public document room at least one day in advance, on a
16 discretionary basis.

17 That is, the office director would have the
18 opportunity to say "no," citing one or more of the
19 exemptions.

20 OPE recommends that the SECY paper that is the
21 topic of discussion be released in advance, as in the other
22 earlier recommendations. But, that related staff papers
23 that are not the direct subject of the meeting not be
24 released in advance. But, if they are discussed at the
25 meeting, that consideration be given, on a discretionary

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1 basis, to putting them in the PDR, as well.

2 COMMISSIONER GILINSKY: Who's going to exercise
3 this discretion?

4 MR. PEDERSEN: The discretion in that case I
5 think would work the same way. It would be first the
6 office director who would determine that, yes, it should
7 or should not go -- subject always, of course, to
8 Commission override.

9 COMMISSIONER GILINSKY: The office director of
10 the originating office?

11 MR. PEDERSEN: That's correct.

12 COMMISSIONER GILINSKY: And who would bring this
13 to his attention? The secretary?

14 MR. PEDERSEN: The secretary could. I would
15 assume that, in many cases, the office director or
16 representative would be at the meeting. But I think a good
17 failsafe device would be to have the secretary take note of
18 this.

19 The point that is at issue here, I think, is that
20 you have a number of papers that address the SECY paper, in
21 one way or another, that are a part of the deliberative
22 process. And I think here's where you have to begin to
23 make judgments about protecting your ability to give candid
24 advice.

25 We're not talking here, necessarily, only about

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1 OPE and OGC documents, as it may seem, but you have to
2 begin to think: At what point do your Exemption 5
3 considerations begin to play in in the development of
4 the SECY paper, for example.

5 There's give-and-take in Bethesda -- various
6 offices expressing views, and so on.

7 COMMISSIONER GILINSKY: Let's see. Would this
8 include, for example, OPE memoranda on the documents?
9 OGC memoranda?

10 MR. PEDERSEN: Yes, except where an OPE or an
11 OGC document is the subject of discussion.

12 For example, this memo today that we're using
13 as the basis for our discussion would, I would assume, have
14 gone into the PDR yesterday, if we were operating under
15 the recommendation, in this case, OPE would make.

16 However --

17 COMMISSIONER GILINSKY: Suppose we had the paper
18 coming up on electrical connectors, and they have written
19 a memorandum on it; OGC is going to deliver a memorandum on
20 it to the Commission. Now, what you're saying is: The
21 original paper would be released --

22 MR. PEDERSEN: The paper that was prepared as
23 the basis for the Commission's discussion would be released;
24 that's correct.

25 COMMISSIONER GILINSKY: What would happen with

jwb 1 your memorandum?

2 MR. PEDERSEN: Our memorandum, under the OPE
3 recommendation, would not be released in advance. If in
4 the meeting one of those memoranda became the subject of
5 discussion or it was referenced, then it would be
6 released on a discretionary basis. But it would be after
7 the meeting.

8 COMMISSIONER GILINSKY: Then you wouldn't be
9 able to use it.

10 MR. PEDERSEN: Initially, at the outset, I would
11 have the same right, Jerry Nelson would have the same right,
12 as the Office directors did, in terms of the SECY paper, to
13 try and indicate to you that there were certain reasons why
14 we think that some of that --

15 COMMISSIONER GILINSKY: So you're putting your
16 comments on a somewhat different basis than those of other
17 staff offices, because theirs would have been included in
18 the basic paper.

19 MR. PEDERSEN: Yes, except I would say one
20 thing in that regard. Many times you have papers developed
21 in Bethesda, as I'm sure that you know, that comment on the
22 SECY paper and raise issues that get brokered out in the
23 process. And those papers are not brought to your
24 attention, except where an issue remains -- in which case,
25 frequently they will attach that paper. In many cases,

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1 OPE comments on these papers in advance, when we have a
2 chance to see them, and those comments are included in the
3 SECY paper. That gives me no problem.

4 I think, where the paper comes up to me, or to
5 my office -- speaking only for my office -- one or two
6 days in advance, "Can we give the Commission the benefit
7 of our advice?", that that in effect would be forcing me
8 to put that in the PDR in advance. It would not be giving
9 me "special treatment", it would be putting me at a
10 disadvantage.

11 COMMISSIONER GILINSKY: We're regarding that as
12 a less formal document.

13 MR. PEDERSEN: Yes. And it isn't the document
14 that is to serve as the basis for Commission discussion.
15 If, in fact, during the meeting an OPE document -- and I
16 don't want to speak for OGC, because I think they would
17 prefer to make theirs available in advance, perhaps; I'm
18 not trying to put words in their mouth -- but if that
19 document became a subject of discussion, if in fact through
20 one of your comments it moved to the center, I believe it
21 should be considered to be made public; yes.

22 But we cannot know that in advance, and I think
23 that's why I'm saying that that protection for the candor
24 of your advice needs to be in the process.

25 So the big difference, then, between OGC and

jwb 1 OPE -- and I think OGC has the ELD and EDO with them --
2 for what it's worth, I have INE supporting my position --

3 COMMISSIONER GILINSKY: You've got the numbers.

4 MR. PEDERSEN: The big difference is: Whether
5 you release all documents in advance; or whether you
6 release only the document that is the focus for Commission
7 discussion. And then treating other documents touching on
8 it, but not directly on the subject, after you find out if
9 in fact it is an object of discussion.

10 MR. GOSSICK: I think I'd like to comment, at this
11 point, that whatever the Commission decides on this point on
12 how to treat OPE's advice to them, or papers, or whatever,
13 I would not want to see this lead to a point where all
14 drafts, from the very first time that people put pencil to
15 paper and the process it goes through in the staff, that
16 all that be subject to going into the PDR. I think that's
17 just unreasonable.

18 COMMISSIONER GILINSKY: I think we're talking
19 about final documents.

20 MR. GOSSICK: That's the point I wanted to make.
21 I would certainly agree that where there is, you know, a
22 nonconcurrence, or a dissenting or a differing view that
23 comes up in the coordination, as reflected in the policy
24 paper, that that position or view would be made known and
25 released as part of the document.

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1 COMMISSIONER GILINSKY: I understood this to
2 be the case.

3 MR. GOSSICK: Yes; right.

4 MR. PEDERSEN: Except, I would just say, it's
5 not clear at what point it becomes "final." Comments from
6 an office director on the draft SECY paper may be "final,"
7 in terms of his comment, and yet that's not necessarily
8 reflected.

9 COMMISSIONER GILINSKY: You say "SECY paper,"
10 that people identify it. It is a package of material.

11 MR. PEDERSEN: That's correct. And that's the
12 benefit, I think, of restricting it to "SECY papers," at
13 some point. Because you have an identifiable body of
14 documents you're dealing with.

15 When you start going beyond that, you get into
16 all kinds of mushiness, as to what's picked up and what
17 isn't.

18 MR. OSTRACH: We view this as a Sunshine Act
19 question. And we believe the purpose of this is, to the
20 extent feasible and useful: Let the public know what the
21 Commissioners are seeing, except where a specific problem
22 would be caused by that.

23 We believe that one of the best ways of doing
24 that is, not only giving the public the SECY documents, but
25 giving them the benefit of the criticism on that document,

jwb 1 the comment on that document -- from OPE, and OGC, and
2 any other staff office. We don't see the problem that
3 Mr. Gossick is afraid of, because we do not believe that
4 those are the documents that are seen by the Commissioners.

5 Commissioners see the SECY paper. If it's from
6 the staff office, they see an OPE comment; perhaps an OGC
7 comment. And unless OPE or OGC or the Commission believes
8 that, due to particular circumstances, harm would be
9 caused by letting those comments out, we see no reason why
10 the public shouldn't see them -- see just what OPE has to
11 say about it, what OGC has to say about it -- that that's
12 just what the Commissioners are getting the benefit of.

13 MR. PEDERSEN: I would say that you have to
14 think, in your own mind, why you are doing this. Steve has
15 just given one statement as to why you are doing this.

16 My understanding of why you are doing this, to
17 go back to the original memo, is to help the public
18 understand the discretion at the open meetings and, if
19 necessary, if they go and look at a transcript, to help
20 them understand what they see written there; that it was
21 not necessarily designed, when we first started talking
22 about this, as a way of letting the public see everything
23 that you see.

24 If that happens and we do get into this
25 question of what about your own assistant's memos to you --

jwb

1 "after all, you see those" -- I think it's very hard to
2 begin drawing lines here.

3 And I think, if you think about this in terms
4 of helping the public understand the meeting and prepare
5 for the meeting, then I think you have a better ability
6 to manage what documents you're releasing here.

7 MR. OSTRACH: I agree with Ken, that helping
8 the public understand the paper at issue is perhaps "the"
9 principle, or at least one of the principle purposes of
10 this paper. And I've found, quite often, that my
11 understanding of SECY papers has been amplified considerably
12 by reading the OPE comments on it.

13 MR. PEDERSEN: You've never told me that before,
14 Steve.

15 MR. OSTRACH: It's a well-kept secret, but I
16 believe that's true. I mean, OPE and OGC are supposed to
17 be the Commission's expert advisers. When they comment on
18 a paper, presumably that is to help make the paper more
19 understandable.

20 I think that, unless particular circumstances
21 mitigate against it --

22 COMMISSIONER GILINSKY: What I gather is, it's
23 whether the release is automatic, or whether it's
24 discretionary.

25 MR. OSTRACH: No, sir. It's whether it's "prior,"

jwb 1 or "retrospective."

2 COMMISSIONER GILINSKY: You're actually suggesting
3 that it be prior release?

4 MR. PEDERSEN: Whether discussed, or not, you see.

5 MR. OSTRACH: Yes, sir. OGC's recommendation is
6 that, at the same time the SECY paper goes downstairs, all
7 of our recommendations are contingent upon the stuff being
8 available in a timely fashion. If it is available in a
9 timely fashion, then the SECY paper would go there', and
10 any staff comments on it. The OPE comment', the OGC
11 comments would also be there, unless the office director
12 decided against that.

13 The OPE position would be that the SECY paper
14 would go downstairs; and then if, during the meeting,
15 discussion turned to "didn't OPE say thus-and-such about
16 it?", then after the meeting the OPE comment would be put
17 in the PDR.

18 COMMISSIONER GILINSKY: Often the OPE memo comes
19 just at the last minute.

20 MR. PEDERSEN: That's because, often, the SECY
21 paper comes at the last minute.

22 COMMISSIONER BRADFORD: For God's sake, let's not
23 get into that.

24 MR. SHAPAR: It's not a one-to-one relationship.

25 MR. OSTRACH: We wouldn't be talking about delaying

jwb

1 any Commission meetings because papers have not been put
2 in.

3 COMMISSIONER GILINSKY: Is there agreement that
4 the SECY paper ought to be there?

5 COMMISSIONER KENNEDY: Yes, at the next meeting
6 we'll discuss that.

7 COMMISSIONER GILINSKY: Is there agreement that
8 the SECY paper ought to go out, beforehand?

9 MR. OSTRACH: Yes, sir.

10 COMMISSIONER GILINSKY: So, we're really talking
11 about: What else, if anything, should go out? And when?

12 MR. OSTRACH: Yes, sir; that's correct.

13 MR. PEDERSEN: If I could just say one more
14 thing, Commissioner, then I'll finish the various office
15 comments and we can begin to discuss it.

16 SECY and NMSS favor Option 4 -- which is to
17 release only SECY papers; to release them automatically;
18 but to not contemplate releasing any other papers at all,
19 either after the meeting or before the meeting.

20 SECY would go slightly further than that and
21 recommend that only SECY papers be released; and that the
22 recommendations and what's in the options, same be deleted,
23 prior to it going out. So that all that would be released
24 would be the discussion and the overview of the issue, but
25 that the alternatives and the recommendations would be

jwb 1 deleted.

2 MR. GOSSICK: Is that the SECY paper?

3 MR. PEDERSEN: This is SECY's recommendation.

4 NMSS does not share that view. NMSS says it should be
5 limited only to SECY papers -- but the complete SECY
6 papers.

7 So there, you have the range of offices who
8 have commented on this paper and their views.

9 It ranges all the way from OGC and their
10 supporters who want to let everything go in advance, all
11 the way over -- if I can describe --

12 COMMISSIONER KENNEDY: We have a different range,
13 back behind you.

14 MR. RIVERBARK: I wanted to make one small
15 calibration on SD's comment. SD said they would release
16 the paper, but on the day of the meeting -- not the day
17 before --

18 MR. PEDERSEN: Sorry.

19 MR. RIVERBARK: -- to eliminate any possible
20 pressure on people, early.

21 MR. PEDERSEN: When we said "at least 24 hours
22 in advance" in the paper, we were very cagey about not
23 saying when that clock necessarily started: 24 hours
24 before the meeting? Or 24 hours before dawn?

25 MR. RIVERBARK: We feel that the paper helps the

jwb 1 person attending the meeting understand what's going on
2 in the meeting -- if he could pick it up at the back of
3 the room, when he comes in, and follow it, that that
4 would be sufficient.

5 MR. GOSSICK: I believe, also, NMSS indicated
6 that they didn't feel it necessary to just automatically
7 release the entire document, but that there were parts of
8 it, you know, that appear unnecessary.

9 COMMISSIONER GILINSKY: Woudn't those be
10 automatically excluded by various exemptions? Certainly,
11 if it were classified it wouldn't be released.

12 MR. GOSSICK: I really don't think that was
13 what they had in mind -- just as an example: a document
14 could be several hundred pages in length, and only two
15 or three pages of that document were pertinent to the
16 issues under discussion.

17 I think that what they were saying is: Let's
18 just release whatever seems to make sense.

19 COMMISSIONER GILINSKY: Are they talking about
20 "the" SECY document being the subject of the meeting?

21 MR. GOSSICK: I think so.

22 MR. PEDERSEN: That's what he's talking about.
23 I just think that gets very complex, when you start having
24 to make judgments as to which 4 or 5 pages out of 50 we
25 discussed. I think these SECY papers for open meetings

jwb

1 are prepared with an eye toward the fact that they will
2 be discussed. And I think that's taken into consideration
3 when they're prepared.

4 I think that's a known fact, and I think it's
5 very unlikely that you'd find anything in there that would
6 cause embarrassment or harm.

7 MR. GOSSICK: Sam, tell us about your --

8 MR. CHILK: I want to make a little difference
9 between what Ken said. You're going to release a SECY
10 paper. I don't think you've got much option, frankly.
11 If it's going to be discussed at a meeting, everybody's
12 going to hear it. And I think the paper, and the contents
13 of the paper, become automatically known whether you release
14 the paper or not.

15 So I'm certainly not opposed to releasing SECY
16 papers that are discussed in open meetings. I would like
17 not to see us have to make an individual determination,
18 each and every time. I'd like to see us just agree to
19 the fact that SECY papers will go down.

20 I think that we should limit it to SECY papers,
21 simply because once you open the area of individual advice,
22 I think you're getting into some questionable and dangerous
23 areas and you don't know where it's going to take you. And
24 I think you ought to have some experience, at least with
25 limiting it to the SECY paper.

jwb

1 And my rationale is: that we ought to release
2 something in advance of the meeting to keep people -- to
3 inform them, and let them follow the discussion a little
4 better. But rather than prepare a summary, or rather than
5 release a whole paper, I would just release the beginning
6 of the paper -- that is, the purpose, the subject, the
7 issues, the discussions, and that kind of thing -- before
8 the meeting, and release the entire paper afterwards.

9 I never intended to preclude the paper from
10 being released. I think it ought to be released.

11 COMMISSIONER GILINSKY: Is it worth doing it?
12 Isn't that a lot of trouble?

13 MR. CHILK: It isn't an awful lot of trouble.
14 All I've got to do is write something out to make something
15 available. And I think the intent of the Act is to give
16 you something that will help people follow the discussion.

17 I don't think they ought to know what the
18 recommendations are, before you know and have a chance
19 to evaluate the recommendations. So I kind of limit it
20 to, you know, the first page and a half of the paper, and
21 this can be done administratively -- provide copies on the
22 back, put them down in the public documents room, make
23 them available so that people would know what the subject
24 is, would understand how we got there -- but, you know,
25 not be able to start questioning you on the rationale

jwb 1 before you, yourselves, have had a chance to listen to and
2 discuss -- I think that's the basic difference.

3 One is kind of an administrative thing; the
4 other thing merely is that I'd like to make the decision
5 one time, and not have to make it each and every time. And
6 I think it ought to be limited to this kind of an area.

7 You're already far advanced, in comparison with
8 the practices of other agencies, but I don't think you
9 ought to get into these matters of individual advice. I
10 don't think you ought to get into a matter of collateral
11 documents. I think it ought to be limited as to what
12 you're going to discuss. That's all. That's what people
13 are here to see and to hear.

14 You give them enough of that so that they can
15 understand the discussion and follow it, in advance,
16 release the thing, and that is it.

17 CHAIRMAN HENDRIE: Release the whole SECY paper?

18 MR. CHILK: After the meeting is over.

19 CHAIRMAN HENDRIE: After the meeting is over.

20 MR. CHILK: Because the public would have already
21 heard it. They would have already known about it.

22 MR. GOSSICK: Why wouldn't you make it all
23 available the day before? You know, the paper's been down,
24 and they've seen the recommendations. I didn't quite
25 follow the rationale for making it a two-step operation.

jwb

1 MR. CHILK: I guess I don't see the public
 2 knowing how the staff arrived at its rationale -- being
 3 able to follow the staff's rationale, knowing what the
 4 conclusions are before you and the staff have had an
 5 opportunity to present your ideas of the conclusions in
 6 the presentation.

7 MR. GOSSICK: They don't know what those
 8 recommendations are.

9 MR. CHILK: That's right, and they don't know
 10 what's going to come out of it.

11 MR. PEDERSEN: I'm sorry, Sam. I didn't mean
 12 to misrepresent you. I just can't find that in your memo.

13 MR. CHILK: It's not.

14 MR. PEDERSEN: Okay.

15 COMMISSIONER GILINSKY: Why would you do it at
 16 the end of the meeting, rather than at the beginning?

17 MR. CHILK: Because the public would have heard
 18 the entire discussion. They would have heard the
 19 recommendations; they would have heard the rationale of
 20 the staff; they would have heard how the staff got to its
 21 rationale; and once having heard that, they might as well
 22 read it.

23 COMMISSIONER GILINSKY: What is the harm with
 24 there being a stack of documents at the beginning of the
 25 meeting?

jwb

1 MR. CHILK: I just think that places them in
2 a position of knowing a little more, almost, than you do.
3 That's my basic concern. And the fact that I can do this
4 very easily, administratively.

5 COMMISSIONER GILINSKY: Sometimes when we read
6 them --

7 COMMISSIONER KENNEDY: Some of us.

8 (Laughter.)

9 MR. CHILK: I wasn't really thinking of it in
10 that vein. But basically, if the thing went down there
11 a day before --

12 COMMISSIONER GILINSKY: We'll be taking it on
13 the chin.

14 MR. CHILK: I think it ought to be placed down
15 in the PDR, maybe the morning of the meeting, maybe the
16 day before. I don't think people ought to be writing you
17 letters, calling you up and saying: Hey, I don't like this
18 rationale.

19 COMMISSIONER GILINSKY: Suppose you sort of
20 collapsed the whole thing -- just put the whole thing in
21 the public documents room the day of the meeting, at the
22 beginning of the meeting?

23 MR. CHILK: I don't have any objection to that.
24 I think it would be beneficial if the people could look at a
25 document the day of, or the day before -- part of the

jwb 1 document -- so that they could at least read and determine
2 what they're going to hear. I think it's a little different
3 to walk in there and be reading a 40-page document while
4 they are listening to a discussion of a 30-page document.
5 You know, I don't think --

6 MR. PEDERSEN: You could do both. You could get
7 a copy in the PDR 24 hours in advance, and you could move it
8 over here, too.

9 I think, because of the difficulties of
10 predicting how many people you're going to have attending,
11 and the size of some of these documents, I think you'd just
12 have to agree you'd do 10 copies, first-come, first-served,
13 or something -- unless you had reason to know it was going
14 to be a heavily attended meeting.

15 MR. CHILK: That's a decision one can make
16 rather easily.

17 COMMISSIONER KENNEDY: Ask for 100 copies, and
18 burn the rest.

19 MR. PEDERSEN: That was what I was afraid of,
20 Commissioner.

21 CHAIRMAN HENDRIE: You know, there are several
22 variations. I am attracted to this one over here, but I
23 don't know that it would make a great deal of difference --
24 between the full SECY paper available in the back of the
25 room --

jwb

1 COMMISSIONER GILINSKY: At the beginning of
2 the meeting.

3 CHAIRMAN HENDRIE: -- at the beginning of the
4 meeting; and an abbreviated version, without the options
5 and recommendations, that could be available the day
6 before, or something like that, a day or two before,
7 with the full paper then going to the PDR subsequently.

8 I think there's a certain merit in the
9 Commission's not having had a chance to hear the staff
10 put their arguments on paper before there's very wide spread
11 distribution of the paper.

12 And of course once that's done, of course it
13 would be a matter of record.

14 COMMISSIONER BRADFORD: Ken, what do you
15 contemplate using as the yardstick for the papers that
16 have been discussed? That is: We have a meeting on a
17 particular matter, and OPE submits a recommendation. It's
18 entirely possible that that recommendation could even be
19 discussed, and could even become the Commission's decision,
20 without it being specifically acknowledged as being the
21 OPE recommendation.

22 How do you handle that?

23 MR. PEDERSEN: Commissioner, I don't think it
24 would be easy. I think it would have to be a decision
25 worked out -- SECY would make an initial determination.

jwb

1 They get all the papers that we do. Let me make it very
2 clear in this regard, though, that I could very easily
3 live with Mr. Chilk's recommendation.

4 Quite frankly, I saw my recommendation as sort
5 of going a step beyond where I would, in my heart of
6 hearts, like to go.

7 I recognized, however, that there may be
8 occasions in a public meeting when a Commissioner may
9 pick up an OPE memo and make a lengthy reference to it.
10 And I merely wanted to indicate that I would not be
11 completely averse to making that available on a
12 closed-meeting basis.

13 I think limiting it to SECY papers, exclusively,
14 gives you a much more reasonable boundary to deal with --
15 a boundary group of papers -- and you don't have to make
16 those kinds of judgments.

17 My experience has been, however, that OPE papers,
18 when they're discussed, are usually fairly openly identified,
19 and the Chairman will say: Okay, we have a paper here from
20 OPE. Ken, would you like to say something about it?

21 In very few cases are they dealt with in a very
22 subtle kind of way. Now, the extent to which a Commissioner
23 may have read one of our papers and already had those ideas
24 anyway, and so he voices them at the meeting, and may not
25 even have read the OPE papers -- just happened to come,

jwb 1 independently, to the same decision, or the same set of
2 conclusions, or something -- I honestly don't know how you
3 deal with that.

4 I guess you'd have to say it would have to be
5 identified by name, or some reference would have to be
6 made to it. Having come to the same conclusion, I don't
7 think you could do that.

8 COMMISSIONER BRADFORD: The other question I had
9 about this confusing discussion at the meeting as a
10 yardstick is: I gather one of the concerns that you have
11 about making things available is, you know, in some way it
12 tends to stifle the range of advice that the Commission
13 might get?

14 MR. PEDERSEN: Yes, sir.

15 COMMISSIONER BRADFORD: And I wonder -- The
16 problem there, I should think, would be the possibility
17 that it would become available. If the person writing the
18 memo doesn't know beforehand that it isn't going to be
19 available, then you have that problem.

20 MR. PEDERSEN: Yes, you do.

21 COMMISSIONER BRADFORD: He doesn't know when he's
22 writing it, or she doesn't know when she's writing it, that
23 it isn't going to be discussed.

24 COMMISSIONER KENNEDY: As this paper points out,
25 Peter, presumably the guy writing the SECY paper does know it.

jwb 1

COMMISSIONER BRADFORD: That's right. But I'm talking about some of the alternatives.

3

COMMISSIONER KENNEDY: Other offices have always presumed that that wasn't the case; they're now free to be as candid and as sharp-penned as they wish, to make certain that we got that kind of advice.

7

MR. PEDERSEN: Let me indicate, Commissioner, why I went the extra step.

9

As the legal analysis points out in here, if an OPE paper is clearly identified at a public meeting and discussed, the odds are very high -- it's an important issue, or whatever, -- at a well attended meeting, that there will be an FOIA request for that paper.

10

11

12

13

14

There's almost no basis -- according to OGC, anyway -- for withholding that paper, once it's been the subject of discussion at an open meeting.

17

18

19

Having heard that, and having already been harassed almost to death, I think, in processing these FOIAs --

20

21

COMMISSIONER KENNEDY: I think that's probably true as a practical matter, not as a legal matter.

22

23

MR. PEDERSEN: I have to yield to the lawyers on that, Commissioner.

24

25

COMMISSIONER KENNEDY: I read their very valuable opinion. That's how I came to that conclusion.

jwb

1 MR. PEDERSEN: If in fact a paper discussed at
2 an open meeting is difficult to preserve under FOIA -- if
3 that is a fact; if the lawyers happen to be right on this
4 one --

5 (Laughter.)

6 MR. PEDERSEN: I was persuaded --

7 MR. SHAPAR: I think you may be speaking to two
8 points. I think you may be referring, on the one hand, to
9 the FOIA as it exists as a statute; and on the other hand,
10 to our regulations.

11 MR. PEDERSEN: How practically we're
12 operationalizing, is what I meant, Howard. You're right.
13 How, in fact, I have to deal with it on a day-to-day basis,
14 and the way we're operationalizing: it is released. And if
15 that's going to be the case every time one of you holds up
16 a memo -- an OPE memo, or makes a clear reference to it --
17 I'm going to have to release it under FOIA.

18 It might be just easier to go ahead and put it
19 in the public document room. But you're quite right: It
20 does affect how my staff will write memos, and I would not
21 tell you otherwise.

22 MR. SHAPAR: Some of your papers are intended for
23 the staff paper, are they not? So you control the situation,
24 to some extent -- I'm not saying this critically -- by
25 deciding whether or not you append it to the SECY paper, and

jwb 1 the results would be different.

2 CHAIRMAN HENDRIE: I think that depends more on
3 the timing. If it's a timely staff draft, then after the
4 timely OPE comment on the staff draft it goes back out to
5 the proprietors of the paper and the staff, who take it
6 into account, who append it, and who make whatever rebuttal
7 or adjustment is appropriate. In that case, then the whole
8 thing comes down.

9 The more normal sequence, I must say, is that
10 there gets to be a shortage of time and people to work on
11 it -- one paper or the other -- and they come separately,
12 and often at the last minute.

13 MR. PEDERSEN: The majority of papers,
14 Mr. Chairman, we see simultaneously with you.

15 CHAIRMAN HENDRIE: Excuses, excuses, excuses.

16 MR. PEDERSEN: I'm sorry.

17 CHAIRMAN HENDRIE: In a shop as leaky as this
18 one --

19 MR. PEDERSEN: -- you should know weeks beforehand
20 what's going on.

21 To do that, Mr. Chairman, I would have to have
22 an intelligence network, and I wouldn't think of having
23 such a network.

24 COMMISSIONER KENNEDY: Why not? Everybody else
25 has one.

jwb

1 CHAIRMAN HENDRIE: It would only take two or
2 three extra slots.

3 (Laughter.)

4 COMMISSIONER BRADFORD: Ken, if I understood you
5 a moment ago, you said that most of the OPE memoranda must
6 now be prepared in contemplation of possible or probable
7 release?

8 MR. PEDERSEN: Commissioner, I say that I don't
9 think, quite frankly, we have until now prepared it with
10 that in mind.

11 We have received a volume of FOIA requests
12 lately that have touched OPE memos, and I have released
13 numerous -- quite frankly -- memoranda in recent weeks and
14 months that I probably would not have released 9 or 10 months
15 ago.

16 I just think, operationally, how we're doing it
17 in this agency, now, is different.

18 COMMISSIONER KENNEDY: How did we arrive at that?

19 MR. PEDERSEN: Most of these have been on appeal,
20 Commissioner, and the rules of the Commission now say that
21 they must go to OGC on appeal.

22 I make an initial finding on the appeal, and the
23 OGC tells me whether they believe that's legally sound. OGC
24 has lately been urging me to release virtually everything.
25 I have not done so. In fact, a paper's on your desk right

jwb

1 indicating a strong conflict with OGC-OPE on whether
2 some safeguard-related papers should be released. But
3 clearly, the advice I'm getting from OGC on appeals is
4 to release almost everything.

5 MR. SHAPAR: Doesn't OGC advise you as to
6 whether or not it's withholdable under one of the
7 categories? Don't you make the decisions as to whether
8 or not it was a policy matter and ought to be released?

9 MR. PEDERSEN: That is correct. They tell me
10 that it should be released, and they also make judgments
11 whether if, in their opinion, the public interest is
12 thereby served.

13 I, in turn, have the right to say: I do not
14 think the public interest has been served. However, I
15 would say this: That when every paper that you ever
16 refused in the first go-round, for whatever reasons you
17 considered to be good ones, comes up on appeal, and the
18 office of general counsel tells you, consistently, they
19 should all be released, it gets somewhat difficult.

20 And I have continued to not release those that,
21 in my honest judgment, I would feel would not serve the
22 public interest. But it is difficult, and I think the
23 Commission is going to have to deal with this.

24 In fact, it's on your desk right now in the
25 context of one issue.

jwb

1 CHAIRMAN HENDRIE: Let's see. Since the
 2 afternoon goes on apace, I find the issue sufficiently
 3 complex, and the discussion far enough ranging, that I
 4 don't have my customary sense of the Commission's
 5 gathering on some point that a decision can be made.

6 I don't know. Am I wrong?

7 COMMISSIONER BRADFORD: Does it make sense to
 8 think in terms -- maybe it doesn't -- but it did seem as
 9 though there was a certain minimum level that we could
 10 agree to, along the lines of SECY papers?

11 I think there are other serious issues involved
 12 with some of the other papers. I guess I don't need to
 13 pursue them, now, because we're going to be coming back to
 14 them, in one context or another.

15 CHAIRMAN HENDRIE: That's a possibility. A lot
 16 of people feel, sort of the minimum position, I think --

17 COMMISSIONER KENNEDY: I'm not going to state
 18 a "minimum position." I'm going to state my position, when
 19 asked.

20 CHAIRMAN HENDRIE: I realized, when I said
 21 "minimum position," that it would going to turn out to be
 22 unfortunate.

23 "A" position has been suggested by Sam --

24 COMMISSIONER KENNEDY: My position -- to be
 25 described in any way you choose -- is simply that: SECY

jwb

1 papers, less the recommendations of the staff, should be
2 made available at the door the day of the meeting. And
3 that, at least, will be in tune with the Congress.

4 That's a splendid place to be, because they've
5 been wanting to open the meetings, to open hearings, for
6 200 years, and I think they've done very well, and indeed
7 instructed us in this regard.

8 We're already about 4000 miles cut in front of
9 everybody else in town, and I realize that that's desirable.
10 But I'm not altogether sure that all the aspects of the
11 vanguard are necessarily desirable. In some of them, we'd
12 be exposed --

13 COMMISSIONER GILINSKY: Could I just understand
14 what it is we're commenting on?

15 COMMISSIONER KENNEDY: Only the recommendation --

16 COMMISSIONER GILINSKY: The last paragraph?

17 COMMISSIONER KENNEDY: "The staff recommends,
18 therefore, that you choose Option 27." Everything else --
19 including all the analysis, the laying out of the options,
20 the analysis of the options -- everything is there, except
21 what the staff itself recommends. They'll tell us that at
22 the meeting, but they will do that then in the context of an
23 explanation as to how they arrived at that and what their own
24 balancing of factors is, and indeed after some discussion with
25 the Commission.

jwb

1 COMMISSIONER GILINSKY: But I don't see how
 2 much is gained by withholding the other three factors from
 3 discussion at the meeting.

4 CHAIRMAN HENDRIE: SECY goes on and says "after
 5 the meeting."

6 COMMISSIONER GILINSKY: I didn't understand.

7 COMMISSIONER KENNEDY: Only that sometimes -- in
 8 my recollection -- I wish I could put my hand on it -- that
 9 we've had a paper, and as the discussion has gone on, before
 10 the discussion has really concluded, the staff's
 11 recommendation is not quite the same as it says in the
 12 paper.

13 If there's anything predecisional in the thing,
 14 it seems to me that's really it. The rest of it is
 15 analytical, or whatever you want -- it's laying out the
 16 issues, and trying to describe the range of considerations
 17 that we ought to take into account -- but recommendations
 18 by the staff, agencies involved, it seems to me is
 19 predecisional advice. The rest of it is just sort of
 20 staff support.

21 And I think predecisional advice is something
 22 that the Congress, and indeed the courts, have recognized
 23 as being properly withholding. And I think of caution of
 24 counsel in this regard -- if they haven't, I would be glad
 25 to do so, myself. I think predecisional advice ought to

jwb 1 be maintained. And in those papers, that's all I think
2 there is.

3 CHAIRMAN HENDRIE: Would you go ahead then,
4 after the meeting, with the full SECY paper?

5 COMMISSIONER KENNEDY: No, I wouldn't.

6 CHAIRMAN HENDRIE: That was, however, what Sam
7 was saying.

8 COMMISSIONER GILINSKY: As a practical matter,
9 I think --

10 COMMISSIONER KENNEDY: It wouldn't make any
11 difference.

12 COMMISSIONER GILINSKY: -- the SECY papers would
13 just have a somewhat different format. You'd be releasing
14 the new SECY papers.

15 COMMISSIONER KENNEDY: You'd be releasing the
16 SECY paper, which is the whole analytical reasoning. There'd
17 just be another page in the back some place which would
18 contain the recommendations.

19 COMMISSIONER GILINSKY: Is your point: to avoid
20 locking them into a position?

21 COMMISSIONER KENNEDY: Yes, in part.

22 COMMISSIONER GILINSKY: Because when you say it's
23 "predecisional," it's really, perhaps, minutes before we may
24 hear it.

25 COMMISSIONER KENNEDY: Or, hours.

jwb 1

(Laughter.)

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COMMISSIONER BRADFORD: But the format is almost always such that you will ask for a staff summary. The staff then orally presents the same recommendation they made in the paper.

6

COMMISSIONER KENNEDY: Right.

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COMMISSIONER BRADFORD: So --

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COMMISSIONER KENNEDY: That's my point, Peter.

9

If it was always exactly as it is in the paper; right. But

10

I think we can easily go back and find a variety of

11

circumstances -- a number of them -- you know, not so few

12

as to be really rare exceptions in which the staff, either

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between the time the paper was actually put up here before

14

us and the time of the meeting, or in the process of the

15

meeting itself, has modified that view somewhat.

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It seems to me they ought to have that opportunity to do so.

17

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COMMISSIONER GILINSKY: But the question is: Will they be constrained to modify it if it were public?

19

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COMMISSIONER KENNEDY: I don't know. I am concerned about any earlier release, for the very reason that the paper suggests.

21

22

23

I think that even the day before can subject the staff, and perhaps even the Commission, to unwarranted and, in my humble judgment, undesirable pressures.

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jwb 1 COMMISSIONER GILINSKY: I wouldn't do it at the
2 beginning of the meeting, because meetings are, in fact,
3 canceled.

4 CHAIRMAN HENDRIE: If the meeting doesn't go off,
5 then the paper doesn't go out.

6 COMMISSIONER GILINSKY: If you did it beforehand,
7 you wouldn't have that option.

8 CHAIRMAN HENDRIE: But you wouldn't want the
9 whole paper there.

10 COMMISSIONER GILINSKY: I recognize his problem.

11 COMMISSIONER KENNEDY: It's not a big thing. I
12 just suggest that for consideration. I'm most concerned --
13 I have not yet gotten to the OPE, OGC problem, which is a
14 different one.

15 There, I'm quite concerned that we have
16 considered them as, in a sense, adjuncts of our own
17 offices. And that was my recollection of the rationale
18 which we used in creating those offices, in both of those
19 instances.

20 Now to, in a sense, back away from that, raises
21 a lot of other questions I think we ought to think about.
22 It's not just simply the release of these particular papers
23 that's involved; it's the whole syndrome of the relationship
24 we ought to think about. And I'm not sure we've thought that
25 through -- about what the implications of the releasing of

jwb 1 the paper may be.

2 CHAIRMAN HENDRIE: Let's see. Let me propose
3 the following to you:

4 I do think we're still a distance apart, even
5 on some first step; and that some further discussion will
6 be useful, and we ought to reschedule it.

7 I think it would be useful for the proprietary --

8 COMMISSIONER KENNEDY: We're going to have to do
9 that either this week, or next. We've got to do that very
10 quickly, then, if we're going to reschedule it.

11 I will be away, and I understand that you will
12 be away.

13 CHAIRMAN HENDRIE: Well, our momentary absence
14 will not be the end of things.

15 COMMISSIONER KENNEDY: My absence will be somewhat
16 more than "momentary," and I have a distinct and definite
17 interest in the matter and I'm prepared to make decisions
18 now. Because I think I've sensed that my colleagues would,
19 at least to an extent --

20 CHAIRMAN HENDRIE: We're not going to make it
21 this afternoon, and there are some problems with scheduling
22 it this week.

23 COMMISSIONER GILINSKY: Are we doing it on the
24 SECY papers themselves?

25 CHAIRMAN HENDRIE: I don't -- I'd be glad to vote

jwb 1 for your proposal, or Sam's proposal --

2 COMMISSIONER KENNEDY: I thought they were all
3 the same.

4 COMMISSIONER GILINSKY: What was Peter's?

5 COMMISSIONER BRADFORD: I didn't remember making
6 a proposal. I thought all I said was: that, as we did seem
7 to have in common a willingness to make the SECY papers
8 available, there was some question over whether or not
9 the recommendation should be proposed -- that was about all.
10 I would be willing to make that recommendation.

11 CHAIRMAN HENDRIE: I think that's useful. I
12 think there's a certain distinction there.

13 What I'm suggesting is that we come back to this
14 subject, and the proprietors of the recommendations should
15 focus a little bit on the following proposition:

16 It seems to me that it may be useful to step a
17 little tentatively into this area, rather than sort of
18 "everything out weeks before"; that you might want to
19 consider the usefulness of trying to agree on something
20 more limited -- perhaps the SECY papers, as has been
21 suggested; either full paper available just at the door as
22 you come to the meeting, or a version -- without
23 recommendations, and alternatives, and so on -- available
24 that morning, or even the day before, as a first step.

25 And then, perhaps if we find that that does not

jwb 1 seem to be a particular problem in the operation of the
 2 Commission, contemplate it some more.

3 I think, if you want to hear a few words about
 4 a subject of interest to some of us this afternoon, why we
 5 need to stop now and turn to that other matter.

6 And I just don't see the other remaining
 7 15 minutes to an hour to get resolved on which of these
 8 possible options that we might consider implementing is
 9 the right time to do it -- just half an hour or an hour
 10 off of that.

11 I don't see strong disagreements among us, but
 12 there are some things that we need to sort out -- but we
 13 just don't have the time -- unless you want to cancel the
 14 next meeting.

15 Any further comments or instructions that we might
 16 leave the staff with?

17 COMMISSIONER BRADFORD: Just one thought. We do
 18 often hear advanced the argument against disclosure, for
 19 this sort of thing, that it would have sort of a chilling
 20 effect on the staff's advisory opinions.

21 I wonder if, when we do come back for further
 22 discussion -- I don't know that any further papers are
 23 contemplated, or necessary -- but I'd like to spend a little
 24 time on just how that works out, specifically. Whether we
 25 really are, at this point, in a situation at which those

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1 papers are written with an eye toward at least the
2 possibility that they're going to be discoverable, or
3 releasable in any case; or whether we still are getting
4 a lot of stuff, at the Commission level, which in some way
5 would be changed, and likely that it would become public.

6 CHAIRMAN HENDRIE: Very good.

7 Sam, you said your memo was attached to their
8 paper? It didn't cover all the points you made?

9 MR. CHILK: I think so, with one possible
10 exception.

11 CHAIRMAN HENDRIE: Well, you'll get a chance to
12 touch it up here for us.

13 All right --

14 MR. PEDERSEN: Mr. Chairman, could I just ask:
15 Are you contemplating another paper?

16 CHAIRMAN HENDRIE: I don't feel a strong need for
17 one. I see --

18 COMMISSIONER KENNEDY: We've got more papers than
19 I want, now.

20 CHAIRMAN HENDRIE: -- I see almost determined
21 shaking of the heads around the table. I would interpret
22 that to mean that you would submit another paper at your
23 peril.

24 MR. PEDERSEN: Advice I willingly take.

25 CHAIRMAN HENDRIE: But the sorts of discussion

jwb 1 items that we've had in mind, just come ready to talk about
 2 those.

3 And you can also start out that next meeting with
 4 a brief summary.

5 I would like, now, to allow the Commission a
 6 minute and a half break, after which we will gather in
 7 closed meeting for a briefing on an OIA report.

8 (Whereupon, at 3:05 p.m., the hearing was
 9 adjourned to go into closed session.)

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